

PD-0804-19

IN THE COURT OF  
CRIMINAL APPEALS OF TEXAS

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3/3/2020  
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JOE LUIS BECERRA,  
*Appellant,*

v.

THE STATE OF TEXAS,  
*Appellee.*

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On Petition for Discretionary Review from the  
Tenth Court of Appeals in No. 10-17-00143-CR  
affirming the conviction in Cause Number  
14-03925-CRF-361 from the 361<sup>st</sup> District Court of  
Brazos County, Texas

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APPELLANT'S REPLY BRIEF TO  
STATE'S BRIEF ON THE MERITS

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ORAL ARGUMENT PREVIOUSLY  
DENIED

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## ARGUMENT

Reply to State's Merits Brief Issue One: The Court of Appeals disregarded long approved preservation methods in finding Appellant failed to preserve error concerning the alternate juror deliberated and voted on the ultimate verdict received by the Trial Court. Claimed error was brought to the attention of both the Trial Court and the State, allowing correction of the error before resort to appeal.

Reply to State's Merits Brief Issue Two: The Trial Court's curative instruction to the jury to disregard anything the alternate juror said before reaching a verdict was too late as deliberation and voting on the verdict received by the Trial Court was completed and no re-vote was taken by the petit jury after the alternate juror was removed.

### A. "Ultimate Verdict" and the Curative Instruction

The State's Brief argues the Trial Court's removal of the alternate juror and later instruction given by the Trial Court cured any harm caused by the presence of the alternate juror during deliberations. (State's Merits Brief, pg. 11). However, the curative instruction did not instruct the petit jury to restart deliberations, or if a vote had been taken, to re-vote on the verdict without the alternate. The instruction neither cured nor addressed the harm that had already occurred – thirteen people voted on Appellant's verdict. That the Trial Court received the verdict from twelve jurors does not change that uncontroverted fact.

"No person may converse with a juror about the case on trial except in the presence and by the permission of the court." TEX. CODE CRIM. PROC. Art. 36.22.

The Trial Judge did not give permission, nor did he ask the lawyers about putting the alternate juror under oath and on the record.<sup>1</sup> The Trial Judge never told the lawyers he spoke to the alternate juror. What appears of record is the Trial Judge telling the alternate juror:

THE COURT: That's okay. So the time now is 10:31. The deliberations began at 9:45. So you were actually in the jury room from 9:45 until 10:31, but there is no return of a verdict at this point. So if I could just ask you to -- let him sit there at that table. If any of the attorneys want to talk to him after we let them know about what has happened, we'll let him -- let them do that at that point in time. Okay?

4 RR 35.

After the lawyers were present, the Trial Judge referred only to the juror note marked received at 10:45, CR 187, asking about the deadly weapon issue, and informed the lawyers, “Just for the record. I pulled that 13<sup>th</sup> juror, the alternate, out of the jury room immediately when we discovered it at 10:31. The jury was deliberating beginning at 9:45 a.m.” 4 RR 39.

The Trial Judge, after reading Article 33.011(b)), told the lawyers, “The possibility still exists [alternate juror’s name] could serve as a juror.” 4 RR 41. This,

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<sup>1</sup> As was done in *Bogue v. State*, 204 S.W.3d 828 (Tex. App. – Texarkana 2006, pet ref’d). In that case, the alternate was with the petit jury for not longer than thirteen minutes. The Trial Judge, before excusing the alternate (this was before the amendments to Art. 33.011(b)), called the alternate as a witness as to their participation without objection. The alternate testified no vote had been taken by the jury before they were excused, nor had the alternate voted. *Id.* at 829-30. After the verdict was received, the Trial Court placed the jury foreman under oath. The foreman testified that the alternate had been in the jury room “less than five minutes,” did not vote on the verdict, but expressed an opinion in deliberations about a fact in dispute. The foreman answered “no” when asked if it influenced the verdict. *Id.* at 830. The Court of Appeals held if the alternate juror was an outside influence, they did not influence the jury’s verdict. *Id.*

from context, likely ended consideration of access to the alternate. Asking the juror about deliberations and voting on the verdict would have been problematic under Article 36.22 and Rule 606(b) of the Texas Rules of Evidence.

However, what the record does reflect is the curative instruction given to the petit jury after the overruling of a Motion for Mistrial based, at least in part, on Appellant's inability to show harm. 4 RR 41. That instruction was as follows:

[TRIAL COURT]: Members of the jury, jury deliberations began at 9:45 a.m. At 10:31 a.m., the Court realized that the alternate juror, [alternate juror name], was allowed into the jury room by mistake and [alternate juror] was at that time asked to separate from the jury. [Alternate juror name] has been placed in a separate room over here and he will continue to serve as the alternate juror in this case. He simply cannot be present during the deliberations of the 12 jurors.

You are to disregard any participation during your deliberations of the alternate juror, [alternate juror name]. And following an instruction on this extra note that the Court received, you should simply resume your deliberations without [alternate juror] being present.

4 RR 43-44 (emphasis added).

The instruction cured nothing. It told the jury to disregard the alternate's participation in deliberations that were already at an end – at least on guilt. The timing of the jury note corroborates this attested fact.

The State's legal position is to instead urge this Court to engage in a legal fiction. The State's argument in their Merits Brief: "Thirteen people went into the jury

room to deliberate, but only the twelve jurors convicted Appellant”<sup>2</sup> is inaccurate. Thirteen people deliberated, voted on the verdict, and the ultimate verdict received was the same verdict deliberated and voted upon by those same thirteen people. This is only known because of the extra-record petit juror affidavit and Appellant’s Motion for New Trial. It would be twisting knots into Article V, Section 13 of the Texas Constitution, Article 33.01 of the Code of Criminal Procedure, and upending long-standing methods of error preservation to accept the State’s fiction as law.

B. Contemporaneous Objection<sup>3</sup>

*Trinidad II* did not hold contemporaneous objection was the exclusive error preservation method for outside influence claims under Article 36.22 of the Texas Code of Criminal Procedure. *Trinidad II* is consistent with Appellant’s position throughout this appeal: “For these reasons, we agree with former Presiding Judge Onion that a violation of Article 36.22 is subject to the contemporaneous objection rule – at least so long as the violation comes to the attention of the defendant, as it did in these cases, in time for him to make an objection on the record.” *Trinidad v.*

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<sup>2</sup> This statement in the State’s Merits Brief essentially admits a violation of Article 36.22 of the Texas Rules of Criminal Procedure occurred when the alternate juror deliberated with the petit jury. No appellate court has held the alternate selected is a “juror” under Article 33.011(b). This issue is not before the Court unless the issue of admissibility of the petit-juror affidavit under Rule 606(b) Texas Rules of Evidence is reached.

<sup>3</sup> Appellant briefed the *Marin* affirmative waiver requirement as to his Article V, Section 13 and Article 33.01 claims, but as contended in both this Court and the Court of Appeals, reaching *Marin* analysis is not necessary as error on all his claims was preserved by the evidence supported Motion for New Trial.

*State*, 312 S.W.3d 23, 29 (Tex. Crim. App. 2010) (“*Trinidad II*”) (citing *Klapesky v. State*, 256 S.W.3d 442 (Tex. App. – Austin 2008, pet. ref’d)).

Appellant’s Brief on the Merits discussed *Klapesky* extensively. (Appellant’s Merits Brief, pgs. 19-21). The *Klapesky* and *Trinidad II* evidentiary records support contemporaneous objection at the time the jury was instructed, not when they retired to deliberate. In *Trinidad II*, the issue of the alternate deliberating with the petit jury was brought up by the trial judge before deliberations began, specifically for the purpose of a contemporaneous objection that was not made. *Trinidad II* at 25.

In *Klapesky*, the alternate’s presence was discovered within five minutes, and before deliberations began. *Klapesky* 256 S.W.3d at 452. Former Presiding Judge Onion recognized in *Klapesky* that a Motion for New Trial could have preserved potential error under Article 36.22:

[Defendant] did not raise any issue about the alternate jurors in his motion for a new trial but advances it for the first time on appeal. [A] specific contemporaneous objection to the claimed error is necessary to give the trial court or the opposing party an opportunity to correct the error.

*Id.* at 452 (emphasis added).

Judge Onion’s point in *Klapesky* was that preservation of error, be it by objection, mistrial motion, or motion for new trial, must allow the trial court and opposing party notice of the assigned error and the chance to correct it before making the claim to an appellate court. This was accomplished twice in this case. Both

*Trinidad II* and *Klapesky* support Appellant's position that no procedural default of his constitutional or statutory claims occurred.

Appellant has previously briefed the inapplicability, both factually and legally, of the contemporaneous objection holdings in *Issa v. State*, 826 S.W.2d 159 (Tex. Crim. App. 1992) and *Hardeman v. State*, 1 S.W.3d 689 (Tex. Crim. App. 1999). These two community supervision revocation cases have been cited by the State in Response to Appellant's Petition for Discretionary Review, (State's Response to PDR, pgs. 3-4), and again in their Merits Briefing. (State's Merits Brief, pgs. 5-6). Appellant refers this Court to Appellant's arguments and analysis in his Response to the State's Reply to his Petition for Discretionary Review. (Appellant's Response to State's Reply to PDR, pgs. 8-9).

The State's argument on exclusivity of contemporaneous objection to avoid procedural default is foundationally flawed. This is illustrated by taking the State's argument to its logical conclusion. The State's legal contemporaneous objection position means no later curative instruction could ever be challenged, no later mistrial denial would preserve appellate review, and even with thirteen jurors in the box when the verdict was received, all would be procedurally defaulted because of failure to object at the beginning of deliberations. This is not the law, has never been the law, and this Court should not allow this case to change decades of cases relied upon by bench and bar on methods of preservation of error in this State.

PRAYER FOR RELIEF

The Court of Criminal Appeals should grant Appellant's request for oral argument, and reverse and remand this case to the Court of Appeals for consideration of his claims on the merits after finding Appellant's claims were not subject to procedural default.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

This Reply Brief complies with TEX. R. APP. P. 9.4(i)(2)(D) in that it contains 1,761 words, in Microsoft Word 2019, Garamond, 14 point.

/s/ LANE D. THIBODEAUX  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been delivered *via* electronic filing on this the 29<sup>th</sup> day of February, 2020 to the following:

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